IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMERICAN MOTORCYCLE ASSOCIATION DISTRICT 37, et al.,

Plaintiffs,

v.

GALE NORTON, in her official capacity as Secretary of the Interior, et al.,

Defendants.
_____/

CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Plaintiffs,

v.

BUREAU OF LAND MANAGEMENT, et al.,

Defendants,

and

DESERT VIPERS MOTORCYCLE CLUB, et al.,

Defendants/Intervenors.
_____/

No. C 03-03807 SI
No. C 03-02509 SI

ORDER RE: CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

On July 16, 2004, the Court heard argument on the parties' cross-motions for partial summary judgment in these two related cases. Having carefully considered the arguments of the parties and the papers submitted, the Court makes the following orders: In No. 03-3807-SI, the Court DENIES the motion by plaintiffs American Motorcycle Association District 37, et al. ("AMA plaintiffs"), and GRANTS the cross-motion by defendants Gale Norton, U.S. Department of the Interior, Bureau of Land Management, and U.S. Fish and Wildlife Service ("federal defendants"). In No. 03-2509-SI, the Court GRANTS the motion by plaintiffs Center for Biological Diversity, et al. ("the Center"), and DENIES the cross-motion by defendants

Bureau of Land Management and U.S. Fish and Wildlife Service ("federal defendants").[1]

BACKGROUND

These cases, brought under the Endangered Species Act ("ESA"), involve two challenges to a June 17, 2002, biological opinion issued by the U.S. Fish and Wildlife Service ("the Service") regarding the Mojave desert tortoise. The plaintiffs in the AMA case are a coalition of off-highway vehicle ("OHV") recreation groups whose members visit the Mojave and Colorado Desert regions of California. The plaintiffs in the Center's case are environmental organizations concerned about livestock grazing and other activities permitted in the tortoise's critical habitat that may undermine its recovery. Both sets of plaintiffs seek to invalidate the biological opinion, though on different grounds.

The Mojave desert tortoise (*Gopherus agassizii*) inhabits areas of the Mojave Desert in California, Nevada, Arizona, and southwestern Utah, and areas of the Colorado Desert in California. In September 1985, the Service determined that the listing of the desert tortoise as an endangered species was "warranted but precluded" by other listing actions of higher priority. Administrative Record ("AR") 275. On August 4, 1989, the Service issued an emergency rule listing the Mojave population as endangered because of an outbreak of a fatal respiratory disease. 54 Fed. Reg. 32,326 (Aug. 4, 1989); AR 274. On April 2, 1990, the Service issued a Final Rule listing the tortoise as a threatened species. 55 Fed. Reg. 12,178 (Apr. 2, 1990); AR 290-303. The Service designated 6.4 million acres as the tortoise's critical habitat on February 8, 1994. 59 Fed. Reg. 5,820 (Feb. 8, 1994); AR 902-929.[2]

Because of the listing of the tortoise, § 7(a)(2) of the Endangered Species Act requires other federal agencies to formally "consult" with the Service when taking any action that "may affect" the tortoise's critical habitat. 16 U.S.C. § 1536(a)(2) (2004). The ESA also directs the Secretary of the Interior to "develop and

[1] Defendant-Intervenors in No. C 03-2509-SI have submitted a Memorandum on Cross-Motions for Summary Judgment, joining in the position taken by the AMA plaintiffs in No. C 03-3807-SI. To the extent that defendant-intervenors move for partial summary judgment in their favor, their motion is DENIED.

[2] The critical habitat designation was made after environmental organizations won a court-ordered consent decree requiring the Service to designate a critical habitat for the tortoise by the end of 1993. AR 903. Under § 4(a)(3) of the Endangered Species Act, critical habitat designation is required at the time a species is listed as threatened or endangered, to the extent "prudent and determinable." 16 U.S.C. § 1533(a)(3)(A)(i) (2004).

implement" a "recovery plan" "for the conservation and survival" of each endangered and threatened species. 16 U.S.C. § 1533(f)(1).

In June 1994, the Service issued its Recovery Plan for the tortoise. AR 548-901. The Recovery Plan, like the listing decisions and critical habitat designation, recognized a host of factors contributing to critical habitat loss and the tortoise's decline, including urban development, military operations, off-highway vehicle activities, livestock grazing, mineral development, and respiratory disease. The Recovery Plan called for the establishment of six recovery units and the creation of fourteen Desert Wildlife Management Areas ("DWMAs") within the recovery units. AR 556. The DWMAs are considered the most essential habitat areas for tortoise recovery. Id. The Recovery Plan recommends that certain activities be "prohibited throughout all DWMAs because they are generally incompatible with tortoise recovery," including domestic livestock grazing and all vehicle activity off of designated roads. AR 618-19. The Recovery Plan, when adopted, was considered "the best available biological information on the conditions needed to bring the Mojave population of the desert tortoise to the point where listing under the Act is no longer necessary (i.e., recovery)." Id. at 5,823; AR 906.

The tortoise's designated critical habitat is located primarily on federal land. AR 903. Critical habitat units lie within the boundary of the 25 million-acre California Desert Conservation Area ("CDCA"), created by Congress in 1976. The Bureau of Land Management ("BLM") manages about 10 million acres of the CDCA. In creating the CDCA, Congress directed the BLM to develop "a comprehensive long-range plan for the management, use, development, and protection of the public lands within the [CDCA]." 43 U.S.C. § 1781(d). The CDCA Plan must take into account "the principles of multiple use and sustained yield in providing for resource use and development, including, but not limited to, maintenance of environmental quality, rights-of-way, and mineral development." 43 U.S.C. § 1781(d). The BLM completed the initial CDCA Plan in 1980.

The proposed federal agency action at issue in these cases is BLM's continued implementation of the CDCA Plan, as it has been formally amended since 1980, modified by previous consultations and proposed interim conservation measures, and as three specific proposals now propose to modify it further: the Northern and Eastern Mojave Desert ("NEMO") Bioregional Plan, the Northern and Eastern Colorado Desert

("NECO") Bioregional Plan, and interim measures developed for the Western Mojave Desert ("WEMO") Region. Because the desert tortoise is a listed species, § 7(a)(2) of the Endangered Species Act requires the BLM to formally consult the Service on the CDCA Plan's likely effects on the tortoise and its critical habitat. AR 5477. The NEMO and NECO Plans and WEMO interim measures are supposed to amend the original CDCA Plan to support the recovery of the Mojave desert tortoise. AR 5495; AR 5499. To that end, the NEMO Plan creates two DWMAs; the NECO Plan creates two DWMAs; and the WEMO measures include four critical habitat units ("CHUs"), which conform to the four DWMAs recommended for that area by the Service's Recovery Plan. AR 7049-50; 5625-26; 5507. Within the DWMAs, the BLM Plans impose grazing restrictions, allow for "limited use" of roads by off-road and other vehicles, designate "washes closed zones" restricting vehicle use to specific routes and navigable washes, and restrict vehicle camping to no more than 100 feet from the centerline of open roads. However, the BLM Plans do not prohibit all domestic livestock grazing or all off-road vehicle use in the DWMAs, as recommended by the Service's Recovery Plan.

The Service's June 17, 2002 biological opinion concluded that the BLM's CDCA Plan, as modified, is not likely to "jeopardize the continued existence of" the desert tortoise or "destroy or adversely modify" its critical habitat. AR 5536. Plaintiffs contest these "no jeopardy" and "no adverse modification" conclusions.

Before the Court are plaintiffs' and defendants' cross-motions for partial summary judgment in both cases.

LEGAL STANDARDS

A. Summary judgment

Summary adjudication is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

In a motion for summary judgment, "[if] the moving party for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact, the burden of production then shifts so that the non-moving party must set forth,

by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial." See T.W. Elec. Service, Inc., v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 317 (1986). In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the non-moving party. See T.W. Electric, 809 F.2d at 630-31 (citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986)); Ting v. United States, 927 F.2d 1504, 1509 (9th Cir. 1991). The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. Thornhill Publ'g Co., Inc. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979).

B. Review of administrative action

Judicial review of the Fish and Wildlife Service's final biological opinion is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2). Pyramid Lake Paiute Tribe v. U.S. Dep't of the Navy, 898 F.2d 1410, 1413 (9th Cir. 1990). The court "shall" set aside any agency decision that the Court finds is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA precludes the trial court reviewing an agency action from considering any evidence outside of the administrative record available to the agency at the time of the challenged decision. See 5 U.S.C. § 706(2)(E); Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44, 105 S. Ct. 1598 (1985); Havasupai Tribe v. Robertson, 943 F.2d 32, 34 (9th Cir. 1991), cert. denied, 503 U.S. 959 (1992).

The court must determine whether the agency decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S. Ct. 814 (1971). The Supreme Court has explained that an agency action is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." Motor Vehicles Mfrs. Ass'n v. State Farm Automobile Insurance Co., 463 U.S. 29, 43 (1983). Although the arbitrary and capricious standard "is narrow and presumes the agency action is valid, . . . it does not shield agency action from a 'thorough, probing, in-depth review.'" Northern

Spotted Owl v. Hodel, 716 F. Supp. 479, 481-82 (W.D. Wash. 1988) (citations omitted). The Court cannot, however, substitute its judgment for that of the agency or merely determine that it would have decided an issue differently. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377, 109 S. Ct. 1851 (1989).

DISCUSSION

A. Cross-motions for summary judgment

This Court's role in reviewing the Fish and Wildlife Service's final biological opinion is limited to a determination of whether the Service "considered the relevant factors and articulated a rational connection between the facts found and the choice made." See Pyramid Lake Paiute Tribe, 898 F.2d at 1414; see also Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 105, 103 S. Ct. 2246 (1983). In these cases, both plaintiffs challenge the June 17, 2002 biological opinion as arbitrary and capricious. The AMA plaintiffs argue that the opinion is unlawful because it inadequately analyzed the role of respiratory disease in the tortoise's decline. The Court finds that the Service did consider disease as one among several relevant factors and articulated a rational connection between those factors and its decision. The Center argues that the opinion is unlawful, primarily because it relies on an improper regulatory definition of the term "adverse modification." As explained below, the Court agrees with the Center's assessment of the regulation, and accordingly finds the biological opinion arbitrary and capricious on this ground.

B. The AMA plaintiffs' motion for partial summary judgment

The AMA plaintiffs, whose access to recreation areas has been reduced in the last fifteen years for the purported benefit of the desert tortoise, move for summary judgment on their First Claim for Relief, which seeks a declaration that the Service's June, 2002 biological opinion is unlawful. The AMA plaintiffs contend that tortoise recovery has not actually been helped by the BLM's closure of trails and riding areas, because of the effects of two diseases, Upper Respiratory Tract Disease ("URTD") and Cutaneous Dyskeratosis ("CD"), on the tortoise population. The AMA plaintiffs argue that the biological opinion is invalid because it fails adequately to consider the serious threat these diseases pose to the tortoise. To that end, the AMA plaintiffs ask the Court to consider over 900 pages of studies about tortoise disease that were not included in the

administrative record supporting the biological opinion.

The AMA plaintiffs argue that the biological opinion is invalid because: (1) the Service did not use the "best available scientific and commercial data" in preparing the opinion, and (2) the opinion does not adequately analyze the effect of the NECO and NEMO Plans on disease transmission among tortoises, thus inaccurately accounting for the role of these diseases in threatening the tortoise's existence. They ultimately contend that the Plans' conservation goal of promoting tortoise contact and genetic dispersal may actually advance the spread of disease, and they fault the Service for not conducting specific analysis to test this hypothesis.

The federal defendants oppose the AMA plaintiffs' motion and cross-move for partial summary judgment in their favor. They argue that it is inappropriate for the Court to consider the plaintiffs' extra-record evidence because the Service used the best available data about tortoise disease, and that the biological opinion adequately analyzed respiratory disease as one factor among many contributing to the tortoise's decline.

The Court agrees with the federal defendants. The Service's initial emergency listing of the tortoise in 1989 was based on an outbreak of highly contagious and often fatal respiratory disease, "previously not known to be a major factor affecting the species' survival." AR 279. Disease was further discussed in the Service's final listing of the tortoise (AR 290-303), the Service's designation of critical habitat (AR 902-929), and the 1994 Recovery Plan (AR 548-901). Moreover, the biological opinion includes a discussion of the most recent tortoise survey results in its environmental baseline. AR 5508-5509. Those results, along with other factors, brought the Service to its conclusion that while "upper respiratory tract disease is likely a factor" in the species' decline, "drought and human-induced perturbations are likely additional factors." AR 5535. The Court finds that the Service considered disease among other relevant factors and made no clear error of judgment.

The AMA plaintiffs urge the Court to consider over 900 pages of scientific literature about tortoise respiratory disease that is not part of the administrative record of this case. Judicial review of agency action typically focuses on the administrative record in existence at the time of the decision. Southwest Center for Biological Diversity v. United States Forest Service, 100 F.3d 1443, 1450 (9th Cir. 1996). In this Circuit, courts may only consider extra-record materials "(1) if necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) when the agency has relied on documents not in the record, or (3) when supplementing the record is necessary to explain technical terms or complex subject

matter." Id. (citations and internal quotation marks omitted.) Here, it is clear from the administrative record that the Service considered disease as one of the relevant factors contributing to the tortoise's decline. Moreover, the Court is not persuaded that extra-record documents are necessary to explain technical or complex issues related to the disease problem. Thus, the Court will not consider the extra-record evidence.

Plaintiff also argues that, under the Ninth Circuit's holding in Kern v. United States Bureau of Land Management, 284 F.3d 1062 (9th Cir. 2002), the Service must undertake a detailed analysis of the impact of the land management plans on the spread of URTD and CD in the tortoise population. Kern involved an Environmental Impact Statement ("EIS") assessing the effects of a resource management plan on the spread of fungus to cedar trees. The Ninth Circuit held that the EIS's two-sentence mention of the fungus problem and referral to another document[3] reflected insufficient analysis to satisfy the requirements of the National Environmental Policy Act ("NEPA"). Id. at 1074. The federal defendants distinguish Kern on the grounds that it involved a clearly inadequate discussion of the fungus' effect on the cedar in the face of a "readily apparent" problem. Here, by contrast, respiratory disease is but one factor among many; its impact on the tortoise is not well understood; and the disease issue is addressed throughout the administrative record. Defs.' Repl. at 6-7. The Court agrees that Kern does not control and finds the Service's evaluation of respiratory disease well within its discretion.

Review under the Administrative Procedure Act requires that substantial deference be given to agency decisions. In light of the evidence presented in the administrative record, this Court cannot say that in issuing the 2002 final biological opinion the Service "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." Motor Vehicles Mfrs. Ass'n v. State Farm Auto. Ins. Co., supra, 463 U.S. at 43; Southwest Center for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1448 (9th Cir. 1996). The Court concludes that, as to the AMA's contentions concerning the alleged failure to adequately assess the plans' impacts on disease transmission, the "no jeopardy" and "no adverse modification" findings in the biological opinion were based on the best available scientific evidence. Accordingly, the Court

[3] Such reference is called "tiering," where the EIS refers to another document that contains a more extensive discussion. In Kern, the other document was not subject to NEPA review and did not contain sufficient analysis either.

GRANTS the federal defendants' motion for partial summary judgment and DENIES the AMA plaintiffs' motion for partial summary judgment on their First Claim.

C. The Center's motion for partial summary judgment

In the related case, the Center seeks partial summary judgment on its first two claims for relief: (1) a challenge to the Service's issuance of the biological opinion and (2) a challenge to the BLM's reliance on that biological opinion. Compl. at 30. The Center alleges that the Service and the BLM have abused their discretion by allowing activities within the critical habitat – most significantly, livestock grazing – that may undermine the tortoise's recovery.

The Center argues: (1) that the Service based its "adverse modification" finding on an illegal definition of that term; (2) that the biological opinion is unlawful because it conflicts with the Service's 1994 Recovery Plan for the tortoise; and (3) that even under the current definition of adverse modification, the biological opinion is arbitrary and capricious because fails to use the best available science when addressing the impacts of cattle grazing, fails to adequately explain its conclusion to permit grazing and off-road vehicle use in light of their negative effects, and fails to provide reasoned analysis of the environmental baseline and cumulative effects. The federal defendants respond that: (1) the plaintiffs' challenge to the Service's definition of "adverse modification" is time barred, and in any event the definition is reasonable and entitled to deference; (2) the 1994 Recovery Plan is an advisory document and not legally binding on the Service; and (3) the biological opinion uses the best available data, adequately explains its conclusions about restricted cattle grazing, and adequately analyzes the environmental baseline and cumulative impacts.

Because the Court is persuaded that the Service relied on an improper definition of "adverse modification," it will not address the Center's other arguments. For the reasons set forth below, the Court finds the June 17, 2002 biological opinion arbitrary and capricious on the ground that the Service relied on an invalid regulation.

1. The proper definition of "adverse modification"

Under the Endangered Species Act, when the Service formulates a biological opinion, it must consider

whether the agency action at issue "is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 16 U.S.C. § 1536(a)(2). The ESA does not define the terms "jeopardy" and "destruction or adverse modification." The Service adopted regulations in 1986 defining "jeopardize the continued existence of" as "to engage in an action that reasonably would be expected, directly or indirectly, to reduce the likelihood of both the survival and recovery of a listed species in the wild," and "destruction or adverse modification" as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." 50 C.F.R. § 402.02 (2004) (emphasis added). The Center contends that this regulatory definition of "adverse modification" of critical habitat is inconsistent with the ESA because it only allows an adverse modification finding if both a listed species's survival and its recovery are affected. Because the Service used this definition to conclude that the CDCA Plan would not adversely modify the tortoise's critical habitat, the Center argues that the biological opinion is arbitrary and capricious.

Plaintiffs rely on Sierra Club v. United States Fish and Wildlife Service, 245 F.3d 434 (5th Cir. 2001), in which the Fifth Circuit invalidated the definition of "adverse modification" in 50 C.F.R § 402.02 as inconsistent with the ESA. The federal defendants advance three arguments against plaintiffs' challenge to the regulatory definition: (1) that it is time-barred, (2) that it is precluded under the Chevron doctrine, and (3) that Sierra Club is factually distinguishable and thus not persuasive.

a. Plaintiffs' claim is not time-barred

The federal defendants contend that plaintiffs' challenge to the regulation is time-barred. Civil actions against the United States are subject to a six-year statute of limitations. 28 U.S.C. § 2401(a). The regulation at issue here, 50 C.F.R. § 402.02, was passed in 1986, 18 years ago. The Ninth Circuit has held that both challenges to procedural violations in the adoption of regulations and policy-based challenges must be brought within six years of the regulation's promulgation. Wind River Mining Corp. v. United States, 946 F.2d 710, 715-16 (9th Cir. 1991). However, a substantive challenge to an agency decision alleging that the agency lacks constitutional or statutory authority may be brought within six years of the application of that agency decision to the challenger. Id.

The question, then, is whether the Center's challenge to the regulatory definition of "adverse modification" is a policy-based challenge, as defendants suggest, or a substantive challenge to the definition as applied in the June 17, 2002, biological opinion. The Court is persuaded that plaintiffs' claim is a substantive challenge to the Service's definition of "adverse modification," which accrued when the Service issued its biological opinion on June 17, 2002, and it rejects defendants' argument that "as-applied" challenges may only be brought by defendants in enforcement proceedings or regulated entities. Thus, the Center's claim is not time-barred.

b. The Service's definition is not entitled to Chevron deference

The federal defendants next argue that the regulation should be upheld because the Service's regulatory definition is entitled to deference under Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842, 104 S. Ct. 2778 (1984). The Chevron inquiry requires a two-step analysis. First, the Court must determine whether Congress's legislative intent is clear. An agency's interpretation may be rejected if it is contrary to clear congressional intent. If Congress's intent is either unexpressed or ambiguous, the agency's interpretation must be accepted by a reviewing court if it is "a permissible construction of the statute." Chevron, 467 U.S. at 844. Reversal is only warranted if the agency's construction is "arbitrary, capricious or manifestly contrary to the statute." Id.

Defendants argue that the term "destruction or adverse modification" is "inherently ambiguous," and thus the Service's interpretation of the statutory language is entitled to deference if it is reasonable. Defs.' Cross-Mot. at 17. Plaintiffs counter that there is no ambiguity in the statute. Congress clearly intended "adverse modification" to have a distinct meaning from "jeopardy," and intended the adverse modification standard "to insure that federal projects do not adversely affect a listed species' recovery." Pls.' Opp. and Reply at 6. The Center first argues that the regulations define "destruction or adverse modification" as always including "jeopardy," therefore improperly conflating the two different standards.[4] Second, the Center points

[4] Like the Fifth Circuit in Sierra Club, this Court is not persuaded by this argument that the regulation renders "jeopardy" and "adverse modification" functionally equivalent. The standards are different: the jeopardy standard evaluates an agency action in terms of "both the survival and recovery" of the listed species itself, while the adverse modification standard evaluates it in terms of the value of its critical habitat for "both survival and recovery." The Court finds that the ESA contemplates two different standards – jeopardy to

out that the ESA defines "critical habitat" as "areas essential for conservation." 16 U.S.C. 1532(5)(A). "Conservation" is defined in the Act as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [in] this chapter are no longer necessary." 16 U.S.C. §§ 1532(3). Because the regulation only allows a finding of "adverse modification" where agency action affects "both the survival and recovery" of critical habitat, it conflicts with the ESA, which contemplates such a finding where an action affects recovery alone.

The parties also disagree about the impact of the ESA's legislative history on this analysis. Legislative history may be consulted during the first step of Chevron analysis. See INS v. Cardoza-Fonseca, 480 U.S. 421, 449, 107 S. Ct. 1207 (1987). Defendants argue that when the regulations were promulgated in 1986, the Service addressed the issue of whether the conjunction "and" should be replaced by the conjunction "or" in the phrase "survival and recovery" within the definitions of "jeopardy" and "destruction or adverse modification," and ultimately rejected the use of "or." 51 Fed. Reg. 19,926, 19,927-28 (June 3, 1986). Plaintiffs argue that when Congress amended the ESA in 1978, it expressly declined to adopt the Service's then-existing regulatory definition of "critical habitat" as "any air, land or water area . . . the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species." 50 C.F.R. § 402.02 (1978). Instead, Congress defined "critical habitat" in terms of "conservation" of a listed species. In 1986, despite Congress's intervening amendment to the ESA clearly rejecting its critical habitat definition, the Service defined "adverse modification" as a direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for both survival and recovery of a listed species."[5] Plaintiffs argue, and the Sierra Club court found, that this definition revived an interpretation rejected by Congress in 1978. Pls.' Opp. at 9; Sierra Club, 245 F.3d at 443.

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species and adverse modification of critical habitat – and that the regulations preserve this distinction, although the standards overlap to some degree. Sierra Club, 245 F.3d at 441; see also Greenpeace v. National Marine Fisheries Serv., 55 F.Supp.2d 1248, 1265 (W.D. Wash. 1999); Conservation Council for Hawaii v. Babbitt, 2 F.Supp.2d 1280, 1287 (D. Haw. 1998).

[5] The 1978 regulatory definition of "adverse modification" was: "a direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for survival and recovery of a listed species." 50 C.F.R. § 402.02 (1978). The 1986 regulation simply added the word "both." See Sierra Club, 245 F.3d at 443 n. 52.

Based on its reading of the statutory language, the Court finds that congressional intent in enacting the ESA was clear: critical habitat exists to promote the recovery and survival of listed species where they are threatened separately, as well as where they are "both" threatened. Under the ESA, "critical habitat" is the area "essential" for "conservation" of listed species. 16 U.S.C. 1532(5)(A). Conservation means more than survival; it means recovery. The regulatory definition of recovery closely resembles the ESA's definition of conservation: "conservation" is "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [by the ESA] are no longer necessary." 16 U.S.C. § 1532(3). "Recovery" means "improvement in the status of listed species to the point at which listing is no longer appropriate." 50 C.F.R. § 402.02. The Court finds that formulating a biological opinion of "no adverse modification" "only where an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits." Sierra Club, 245 F.3d at 442 (emphasis in original). Consequently, there is a clear conflict between the ESA and 50 C.F.R. § 402.02, and the regulation must fail.[6]

c. Sierra Club is persuasive

While the Fifth Circuit's opinion does not bind this Court, its reasoning is persuasive. Other courts, including courts in this circuit, have also agreed with the Sierra Club court's view of the regulatory definition. See Natural Resources Defense Council v. Evans, 279 F.Supp.2d 1129, 1176 (N.D. Cal. 2003) ("the ESA requires consultation even where an action affects only the species' recovery and not its survival through alteration of critical habitat"); Natural Resources Defense Council v. U.S. Dep't of Interior, 275 F.Supp.2d 1136, 1149 (C.D. Cal. 2002) ("the presence of a critical habitat designation triggers consultation when a proposed land use may threaten the conservation or recovery of a listed species"); New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Service, 248 F.3d 1277 (10th Cir. 2001) ("[t]hough these regulatory definitions are not before us today, federal courts have begun to recognize that the results they produce are

[6] The Court invalidates only the regulatory definition of "destruction or adverse modification," not the entire regulation. See Sierra Club, 245 F.3d at 443, n. 61.

inconsistent with the intent and language of the ESA").

Defendants attempt to distinguish Sierra Club because it involved a determination by the Service that designating critical habitat for a listed species (the Gulf sturgeon) was "not prudent," rather than a biological opinion of "no adverse modification." The Court does not consider this a salient distinction. To the contrary, once a species is listed as endangered or threatened, the regulatory definition of "adverse modification" figures prominently throughout the statutorily mandated consultation process. A biological opinion is the key safeguard in the ESA's listing process: for each listed species, the Act mandates that the Service designate critical habitat for the listed species, that other federal agencies formally consult with the Service regarding the effects of their actions on listed species and their critical habitat, and that the Service issue a biological opinion at the end of the consultation process, making a formal finding on whether the agency action will result in jeopardy to the species or adverse modification to its critical habitat. In Sierra Club, the regulatory definition determined whether the formal consultation process would be triggered in the first place; here, the definition controls the outcome of consultation. The use of an improper definition is arguably even more significant at the biological opinion stage, since the biological opinion controls whether agency action may proceed.

Therefore, the Fifth Circuit's reasoning regarding critical habitat designation applies with equal force here. The regulatory definition operates to allow an adverse modification finding only where agency action affects the value of critical habitat to both recovery and survival, while the ESA contemplates restricting agency action where it affects recovery alone. The Court finds that, in the context of a biological opinion, the effect of this definition is to impose a higher standard for "adverse modification" than the ESA permits.

2. The Service's reliance on an improper definition was not harmless error

The Court does not find that the Service's reliance on an invalid regulation constitutes harmless error. Under the APA, the doctrine of harmless error applies to judicial review of agency action. See 5 U.S.C. § 706 ("due account shall be taken of the rule of prejudicial error"). An agency's error is harmless if it "clearly had no bearing on the procedure used or the substance of decision reached." Buschmann v. Schweiker, 676 F.2d 352, 358 (9th Cir. 1982), citing Braniff Airways v. C.A.B., 379 F.2d 453, 466 (D.C. Cir. 1967).

Here, the definition of "adverse modification" undoubtedly controlled the substance of the Service's

biological opinion. It is true that, in Sierra Club, the Service expressly found that designation of critical habitat was necessary to the recovery but not the survival of the species at issue. The June 17, 2002 biological opinion does not contain such a clear statement that the Service's mistake impacted its analysis of the CDCA Plan. But the statutory purpose of consultation is to evaluate for jeopardy and adverse modification, and there is no reason to think the Service failed to follow its own regulatory definition in this case. 16 U.S.C. § 1536(a)(2). Moreover, the biological opinion itself suggests, and the administrative record confirms, that had the Service considered the impact of the CDCA Plan on recovery alone, it might have made a different finding regarding adverse modification. The biological opinion expressly states that the CDCA Plan "is structured to a great degree to rely on § 7(a)(2) consultation to avoid jeopardy or adverse modification of critical habitat, rather than to establish a program that promotes recovery of listed species in conformance with § 7(a)(1) of the Act." AR 5542. Thus, the biological opinion's conclusion rests on the improper definition of adverse modification, and it relegates analysis of recovery alone to the optional "conservation recommendations" section. AR 5542-5546. Indeed, the only statements considering how the CDCA Plan would affect the recovery of the desert tortoise appear in this same "conservation recommendations" section, rather than in the body of the opinion itself.

Because of the biological opinion's reliance on an invalid regulation, this Court will not examine it further, except to note that the opinion uses the best available scientific data as discussed in Part B, above.[7]

The Court finds that the proper definition of "destruction or adverse modification" is: "a direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for either the survival or the recovery of a listed species." The Court hereby VACATES and REMANDS the biological opinion to the Service and orders the Service to reconsider its biological opinion of the CDCA Plan in light of the appropriate standard. See Federal Election Comm'n v. Akins, 524 U.S. 11, 25, 118 S. Ct. 1777 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case – even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful

[7] The Court also declines to consider Exhibit A to Pls.' Mot., the "Fort Irwin Tortoise Panel Report" dated March 15, 2000. This document is not part of the administrative record in this case. The Court finds that the Center has not made the showing necessary for it to consider extra-record materials. See Southwest Center for Biological Diversity, 100 F.3d at 1450. Accordingly, the Court has not considered this submission.

discretion, reach the same result for a different reason").[8]

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby DENIES the AMA plaintiffs' motion for partial summary judgment and GRANTS the federal defendants' cross-motion for partial summary judgment as to the AMA plaintiffs in No. C-03-3807-SI (docket ## 71, 82). In No. C-03-2509-SI, the Court GRANTS the Center's motion for partial summary judgment based on the Fish and Wildlife Service's use of an improper definition of "adverse modification," and VACATES and REMANDS the biological opinion to the Service for reconsideration consistent with this opinion (Docket ## 71, 82). To the extent that the defendant-intervenors have joined the AMA plaintiffs' motion for partial summary judgment, that motion is DENIED.

IT IS SO ORDERED.

Dated: August 3, 2004

S/Susan Illston
SUSAN ILLSTON
United States District Judge

[8] The Court declines to order further briefing on the issue of whether to vacate the biological opinion during the period of remand. "Although not without exception, vacatur of an unlawful agency rule normally accompanies a remand." Alsea Valley Alliance v. Dep't of Commerce, 358 F.3d 1181, 1185 (9th Cir. 2004); see, e.g., Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405 (9th Cir. 1995); see also Fertilizer Inst. v. EPA, 935 F.2d 1303, 1312 (D.C. Cir. 1991). The Ninth Circuit has found exceptions based on concern for the "potentially one-sided and irreversible consequences of environmental damage prompted by vacating defective rules during remand." Natural Res. Def. Council v. Dep't of Interior, 275 F.Supp.2d 1136, 1143 (C.D. Cal. 2002). See Idaho Farm Bureau, 58 F.3d at 1405 (leaving in place final rule listing snail as endangered species during period of remand); Western Oil & Gas Ass'n v. EPA, 633 F.2d 803, 813 (9th Cir. 1980)(leaving in effect during re-enactment of designation process the designations of certain areas as failing to meet federal air quality standards). In this case, equity does not demand departure or exception from the normal rule of vacatur. It is unclear whether or how a proper adverse modification analysis will affect the biological opinion regarding the desert tortoise, and the Court cannot predict what the new opinion will conclude. Failing to vacate the biological opinion, thus allowing the CDCA Plan to go forward *pendente lite*, might have irreversible consequences for the desert tortoise.